

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

YONKERS RACEWAY D/B/A EMPIRE CITY CASINO  
AT YONKERS RACEWAY  
Employer

and

Case No. 02-RC-082872

LAW ENFORCEMENT EMPLOYEES  
BENEVOLENT ASSOCIATION  
Petitioner

and

YONKERS RACEWAY POLICE  
BENEVOLENT ASSOCIATION  
Intervenor

and

Case No. 02-CA-083907

YONKERS RACEWAY D/B/A  
EMPIRE CITY CASINO AT YONKERS RACEWAY

and

CATHY LEE, An Individual

*Jeff F. Beerman, Esq.*, of New York, New York,  
for the Acting General Counsel.  
*Joseph DeGiuseppe, Jr., Esq.*, (Bleakley, Platt & Schmidt, LLP)  
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for the Respondent-Employer.  
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for the Charging Party.  
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of New York, New York  
for the Intervenor

**DECISION**

**Statement of the Case**

Kenneth W. Chu, Administrative Law Judge. This case was tried on March 4, 2013,<sup>1</sup> in New York, New York pursuant to an amended complaint and notice of hearing issued by the Regional Director for Region 2 of the National Labor Relations Board (NLRB) on July 18. The

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<sup>1</sup> All dates are in 2012 unless otherwise indicated.

Empire City Casino at Yonkers Raceway (the Respondent), New York is a casino featuring state lottery, slot machines, dining and harness racing. The hearing involves a complaint (2-CA-083907) alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by disseminating a no solicitation/distribution rule to managers and supervisors instructing them to inform employees in an appropriate bargaining unit that they are prohibited from advertising on behalf of another union or denigrating their current union while on the Respondent's property. The no solicitation/distribution rule was sent via email by Jason Bittinger (Bittinger), who was and is the Assistant Director of Security for the Respondent. The charge regarding this rule was filed by an individual, Catherine Lee (GC Exh 1(a)).<sup>2</sup> The hearing also consolidated an objection over a representative election that was held between competing unions (02-RC-082872).

The Respondent filed a timely answer to the complaint denying the material allegations in the complaint regarding the unfair labor practice violation (GC Exh. 1(o)).

At the hearing, the Acting General Counsel moved to amend paragraph five of the amended complaint (GC Exh. 3; Tr. 7, 8). The original paragraph five states

From on or about May 2012 to mid July 2012, Respondent, by posting an email from Bittinger to Cerasi on the Respondent's bulletin board, promulgated and maintained the following rule:

"Please advise all Union members that they are not permitted to advertise another union or bash their current union while on property this includes posting flyers on company property."

Paragraph five was amended to state

On or about April 4, 2012, Respondent, by disseminating an email from Bittinger to employees promulgated and maintained the following rule:

"Please advise all Union members that they are not permitted to advertise another union or bash their current union while on property this includes posting flyers on company property."

Paragraph six in the amended complaint was deleted and replaced to read

By the conduct describe above in paragraph 5, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Three witnesses testified at the hearing. Briefs were timely filed by the Acting General Counsel and Respondent after trial, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses<sup>3</sup>, I make the following

<sup>2</sup> Testimony is noted as "Tr." (Transcript). The exhibits for the Acting General Counsel and Respondent are identified as "GC Exh." and "R Exh." Petitioner's exhibits are identified as "P. Exh." The closing briefs are identified as "GC Br." for the Acting General Counsel and "R Br." for the Respondent.

<sup>3</sup> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in

Continued

## Findings of Fact

### I. Jurisdiction and Labor Organization Status

5 The Respondent, a New York corporation with its principal office in Yonkers, New York, is engaged in the operation of a New York State video lottery and slot gaming facility.<sup>4</sup> During the representative 1 year period, the Respondent's operational business derives gross revenues in excess of \$500,000 from patrons throughout the State of New York and purchases and  
10 receives goods valued in excess of \$5,000, directly from suppliers located outside of the State of New York. Accordingly, I find, as the Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

15 The Charging Party, Catherine Lee (Lee) was and is employed with the Respondent as a peace officer. Local 153, OPEIU (Local 153) was the collective bargaining representative for the peace officers, sergeants and lieutenants during all relevant times (GC Exh. 4). The Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. The Alleged Unfair Labor Practice

#### a. The competing unions

20 As background, in April, the Law Enforcement Employees Benevolent Association (LEEBA or Petitioner) began a campaign to represent employees formerly represented by Local  
25 153 OPEIU, AFL-CIO (Local 152). On June 12, LEEBA filed a petition to represent a unit of security officers, but excluding sergeants and lieutenants as supervisors.

30 On June 25, the Yonkers Raceway Police Benevolent Association (the Intervenor or YRPBA) intervened in the petition and sought to represent a unit comprising of all security officers, including sergeants and lieutenants. The Petitioner alleges that YRPBA is merely a reconstituted group of Local 153 members. On July 24, the Regional Director issued a Decision and Direction of Election, finding that the Intervenor was qualified to represent a guard unit and that the sergeants and lieutenants are not supervisors within the meaning of Section 2(11) of the Act.<sup>5</sup> The Regional Director then ordered an election among the employees in the  
35 appropriate bargaining unit consisting of

all full-time and regular part-time uniformed peace officers, sergeants and lieutenant, but excluding all other employees, including office clerical employees, professional employees, and supervisors as defined under the Act (GC Exh. 1(m)).

40 The secret ballot election was conducted on August 24 (discussed further below). The Decision and Direction of Election was not appealed (GC Exh. 4).

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contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was not credible and unworthy of belief.

<sup>4</sup> The Board previously held that the Respondent's operation is primarily a casino and that the racetrack exception is not applicable. *Yonkers Racing Corp.*, 355 NLRB 225 (2010).

50 <sup>5</sup> The Regional Director, in her decision, found no basis to the allegation that YRPBA was directly or indirectly affiliated with Local 153.

*b. The posting of the leaflets*

Bitteringer testified that he has been employed for over 6 years with the Respondent and is presently responsible for the daily operations of the security department, issuing work  
 5 schedules, disciplinary actions and interviewing new employees. The Respondent admits that Bitteringer is a supervisor within the meaning of Section 2(11) of the Act.

On April 4, a leaflet criticizing Local 153 was posted on the exterior door of the security department's dispatch office. Bitteringer described the configuration of the security service area  
 10 and where the flyer was first posted. He testified that the security service area is located in the basement of the Respondent's facility and is known as the central dispatch area. He said that one would enter the area through an exterior door. The central dispatch area is opened to the public. Patrons and employees would use this area for various reasons, such as to file  
 15 complaints, make copies of documents, conduct interviews regarding security issues or criminal activities, and to discuss various security matters.

When patrons and the security personnel are entering the security dispatch area, they would first walk through the exterior door. Anything posted on the exterior door would be  
 20 noticed by the general public and employees. Within the dispatch area, there are offices with doors for privacy. Bitteringer occupies one of the private offices. In the back area, there are also lockers and changing rooms for the peace officers and where the union bulletin board is located (Tr. 23, 24).

Bitteringer testified that the leaflet was posted on the exterior door to the dispatch area and  
 25 on the company bulletin board (Tr. 28; GC Exh. 5 at 2). The flyer was handwritten and stated "When you are on the payroll you get pay to look the other way." In addition, on the bottom right side of the flyer, there were two dollar signs (\$\$), followed by two eyes looking "the other way" with two stick figures to the left of the eyes.

The leaflet seemingly denigrated Local 153, but did not promote a competing union. Bitteringer testified that he was aware that the Respondent had a no solicitation and distribution  
 30 policy regarding the distribution of literature by employees<sup>6</sup> (Tr. 24, 25, 29; R Exh. 1). The no-solicitation and no-distribution policy in effect since March 2007 states

Empire City - Yonkers Raceway has established a "No Solicitation/Distribution Policy" in order to maintain a work environment free from disruption to both guests and  
 35 employees.

## PROCEDURE

In order to avoid unnecessary annoyance and interruptions from an employee's work, solicitation by an employee of  
 40 another employee is prohibited while either person is on working time whether for charitable, social or other non-work  
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<sup>6</sup> The complaint only alleges the promulgation and maintenance of an unlawful rule issued by Bitteringer that interfered with, restrained, and coerced employees in the exercise of the rights guaranteed  
 50 in Section 7 of the Act in violation of Section 8(a)(1) of the Act. Whether or not the no solicitation/distribution policy is in violation of the Act is not an allegation raised in the Acting General Counsel's complaint and therefore, not an issue before me. *Bakersfield Californian* 337 NLRB 296 (2001); also, see, allegations in the amended complaint and in the GC Br.

related reasons. Employee distribution of literature, handbills or other printed materials on the YRC's premises or through its e-mail system is strictly prohibited on working time and in work areas at any time. Trespassing, soliciting or distributing literature by non-employees on YRC premises *or through its e-mail system* is prohibited at all times.

Any employee who violates this policy will be subject to discipline up to and including termination.

Bittinger said that he took the leaflet down from the exterior door and company bulletin board on April 4. Bittinger said the flyer violated the no solicitation/distribution policy and had inferred some criminality was occurring with his security department. He also inferred that the flyer was union bashing Local 153 because it stated "...if you're on the payroll you get to look the other way" (Tr. 33, 34). He said he was particularly upset over the flyer because it was posted on the exterior door of the dispatch area and readily observed by the security personnel and the general public. Bittinger insisted that it was this flyer that prompted him to promulgate his rule by email on April 4. Bittinger said that two other leaflets were subsequently posted on the exterior door to the central dispatch area and on the company bulletin board just after his April 4 email. The second leaflet (GC Exh. 5 at 1) stated

Peace Officer lets get Local 153 out and lets find a better union to represent us. Do not vote for reinstating Local 153. They don't do anything for us. The last 3 years were a waste lets stop them from getting another 3

No benefits come from Local 153 Insurance comes from the Raceway.

Bittinger testified that he immediately removed the leaflet, but a third flyer was posted shortly afterwards. The third one (GC Exh. 5 at 3) stated

Local 153 is receiving \$56,846.00 a year in dues and they have not done anything for us. They need to go. Get a new union.

Bittinger testified that the last two leaflets were posted within a couple days after his April 4 email. Bittinger denies knowing where the three flyers came from, but insisted the flyers did not come from LEEBA and that LEEBA was not active in any manner on the Respondent's premises. Bittinger said he did not remove any other union literature from that time on (Tr. 29, 30). In summary, Bittinger maintains that there were three separate postings of three flyers. The first flyer resulted in the April 4 email. The two additional leaflets were posted separately within days of his email. All three flyers were separately posted on the exterior door to the central dispatch area and on the company bulletin board. The same flyers posted on the union bulletin board were not removed by Bittinger (Tr. 40-45).

The charging party, Lee, testified that she has been a peace officer for almost 6 years with the Respondent and is employed on the midnight to 8 a.m. shift. She held that position and shift in April (Tr. 51). Lee claimed that officer Magdiel Perdomo (Perdomo) had posted the second and third flyer<sup>7</sup> and was present when the 2 flyers were posted by Perdomo. She

<sup>7</sup> Perdomo had supported LEEBA during the election campaign. The Respondent terminated Perdomo's employment. A subsequent alleged unfair labor practice charge was filed, but the charge was dismissed by the Regional Director (R. Br. at 12).

asserted they were not posted separately as testified by Bittinger. Lee also stated that flyers two and three were posted in mid-April, which was also contrary to Bittinger's testimony that all the flyers were posted within a few days of his April 4 email (Tr. 52, 53, 66, 67).

5 *c. The no union bashing rule*

Prompted by the first flyer, Bittinger issued his no union bashing rule by email to the Respondent's security managers, lieutenants and sergeants on April 4 (GC Exh. 3). Bittinger said that the email was sent only to the people listed on the email and no one outside of management received this email (Tr. 27, 28). The email stated

**Bittinger, Jason**

15 **From:** Bittinger, Jason  
**Sent:** Wednesday, April 04, 2012 1:47 PM  
**To:** Ball, Andrew; Corasi, Anthony; Conroy, P Richard; Delango, Louis; Lewis, Joan; Moran, Jack; Febres, Jr. Bienvenido; Saglimbeni, Anthony; Schuler, Brian; Bunes, Edward; Parone, Frank D.; Porucznik, Robert; Hansen, Alfred  
**Cc:** Cola, Charles  
**Subject:** Union

20 Please advise all Union members that they are not permitted to advertise another union or bash their current Union while on property this includes posting flyers on company property

25 Bittinger testified that he had removed other postings on the premises, but this was the first time he needed a response was appropriate due to the nature of the first leaflet. When asked why, Bittinger said he found the flyer offensive to him because it infers that some of his security employees were allegedly on "the payroll" and are paid to "look the other way" (Tr. 31-36).

30 Bittinger insisted that his rule was disseminated only to managers<sup>8</sup> and that he never discussed the contents of his email with anyone, including union members from Local 153 and LEEBA or with other managers. Bittinger said that the rule was implemented on own initiative without guidance or discussion with the Respondent's Human Resources office (Tr. 27-32). Bittinger hoped the rule would put a stop to publications of perceived criminal activity involving the security department, but also admitted that the rule related to union activity. He perceives the flyers to be union bashing, particularly of Local 153, and wanted to put a stop to such  
 35 conduct. Bittinger said he never repudiated or rescinded his email (Tr. 36, 46, 47).

40 Lee testified that she saw the rule in an email posted in mid-April on the company bulletin board (Tr 52, 56, 60). She explained that she did not actually receive the email (GC Exh. 3), but only saw a copy of the email on the company bulletin board. The email that was posted was identical to the one Bittinger had sent, except that the heading on the posted email had the name of Anthony Corasi (Corasi) (P Exh. 1).<sup>9</sup> Lee said that Corasi is a manager that works under Bittinger.

45 Lee maintains that the email posted by Corasi in mid-April on the company board did not reflect the real date of the email. Lee believed that the email was "backdated" to April 4 to

<sup>8</sup> Bittinger said the lieutenants and sergeants were union members of Local 153 at the time he had sent his email to them (Tr. 32). The parties stipulated that the lieutenants and sergeants were employed by the Respondent and have been employees as defined under Section 2(3) of Act (GC Exh. 3).

50 <sup>9</sup> The Respondent objected to the submission of the Corasi email. I allowed it in so that a comparison could be made of the two different emails.

protect management officials so that the Respondent could show that the notice to instruct employees not to engage in union bashing had already went out before Officer Perdomo was allegedly disciplined for distributing the flyers (Tr. 62-65).

5 *d. The election*

On August 24, a secret ballot election was conducted in the appropriate unit of employees

10 all full-time and regular part-time uniformed peace officers, sergeants and lieutenant, but excluding all other employees, and supervisors as defined under the Act (GC Exh. 1(m)).

The tally of the ballots at the conclusion of the election showed the following results

15	Approximate number of eligible voters.....	130
	Number of void ballots.....	0
	Number of votes cast for <b>Petitioner</b> .....	54
	Number of votes cast for <b>Intervenor</b> .....	58
20	Number of votes cast against participating labor organizations.....	3
	Number of valid votes counted .....	115
	Number of challenged ballots.....	0
	Number of valid votes counted plus challenged ballots.....	115
25	Challenges are not sufficient in number to affect the results of the election.	
	A majority of the valid votes counted plus challenged ballots has been cast for Intervenor.	

30 The election was won by the Intervenor, YRPBA. On August 30, the Petitioner LEEBA timely filed six objections to the election (GC Exh. 1(e)). On January 18, the Regional Director issued a Notice of Hearing on Objection and Order Consolidating cases. The sole objection investigated was as follows<sup>10</sup>

35 Objection 2: Intervenor held captive audience meetings with employees within 24 hours of the election and engaged in disseminating campaign literature on Employer premises within 24 hours of the election.

40 In support of Objection 2, the Petitioner alleged that the no-solicitation policy regarding employee distribution and posting of union and campaign material on the Respondent's premises was not uniformly applied by the Respondent. The Regional Director determined that the objection raised sufficient substantial and material factual issues which may best be resolved through testimony at trial. The Regional Director determined that the Petitioner's objection was sufficiently related to the 8(a)(1) complaint that consolidation of both for the hearing would be appropriate (GC Exh. 1(m)).

45 *e. The objection*

The Petitioner LEEBA argues that the rule promulgated by Bittinger's email was never rescinded and had a chilling effect on the employees leading up to the election. The Petitioner argues that the rule had an unsettling psychological effect on the employees as they went to

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<sup>10</sup> The Petitioner requested to withdraw the remaining objections and the request was granted.

vote and interfered with the free election. The Petitioner also argues that the no union bashing rule was applied by the Respondent in a discriminatory manner because YRPBA was permitted to conduct a campaign criticizing LEEBA on the Respondent's premises prior to the election (Tr. 15, 16).

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Lee testified on behalf of LEEBA. Lee said that she was involved in the election campaign on behalf of LEEBA. Lee said that she prepared and mailed a few informational letters to her coworkers and attended a few union meetings on her own time. She insisted that no LEEBA campaign activities occurred on company time or premises. She also insisted that no LEEBA literature was posted on the union bulletin board. She said that LEEBA was careful not to engage in union activities on the Respondent's premises and time because she and others were fearful of reprisal by the employer. Lee pointed out to Officer Perdomo's termination as an example of a retaliatory act by the Respondent (Tr. 66-70).

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In contrast, Lee said that she observed YRPBA union literature being posted "all over the place at central (dispatch area)" in June (Tr. 70). When inquired further, Lee clarified that the only literature she observed was the union authorization petition by YRPBA. She admitted that the petition was not posted on the company bulletin board (Tr. 69-71). Lee testified that one of her sergeants, Orbeniki, was actively seeking petition signatures in June and had actually asked her to sign the petition.<sup>11</sup> Lee said she did not complain about the union authorization petition in the central dispatch area for fear of retaliation. (Tr. 71-73).

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Lee testified that she was also aware that YRPBA was circulating union literature on the night and morning before the election. She testified that sergeant Lukavitch was handing out leaflets that denigrated LEEBA and encouraged the employees to vote for YRPBA. The leaflet was a standard 8 ½ x 11 sheet of paper and stated in a bold large font print "IT CAN HAPPEN TO YOU" followed by a second caption in a smaller font "CAN YOU AFFORD TO WAIT 3 YEARS WITHOUT A RAISE?" The leaflet then followed with two examples of LEEBA's inability to negotiate a raise during the last 3 years for its bargaining unit employees. Following the two examples, the leaflet accused LEEBA President Kenneth Wynder of keeping the union members' money and that LEEBA gave its members nothing in return. The leaflet ends with another bold font print at the bottom of the document stating "SECURE YOUR FUTURE-VOTE YRPBA!" (P Exh. 2).

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Lee said that Lukavitch was distributing the leaflets the night before the election on the casino floor. Lee admitted that she did not see sergeant Lukavitch distributing the flyers, but received a flyer from another officer. Lee said she received the flyer while she was having lunch at 2 a.m. in a deli across the street from the Respondent's facilities (Tr. 74-76).

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Lee testified that she also saw peace officer Mohammad Sheikh (Sheikh) passing out "paper" on the night of the election. She observed Sheikh give out the paper on the casino floor near mid-night on August 23 and observed him conversing with two other peace officers at their duty post. Lee said that she received one of the leaflets that Sheikh distributed from a friend. Like the Lukavitch flyer, Lee said the leaflet allegedly distributed by Sheikh was given to her while she was having her 2 a.m. lunch in the deli across from the casino (Tr. 78-80). She said

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<sup>11</sup> The correct name of this officer is sergeant Wilmanicki. Lee had previously testified at the Region 2 hearing concerning the certification of YRPBA for the purpose of representing the Respondent's security guards. At that time, Lee testified that Wilmanicki was soliciting signatures for a petition in support of YRPBA in the security department's central office on June 23. According to Lee, Wilmanicki asked her to sign the petition, which she refused because she supported LEEBA (GC Exh. 4 at 4).

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that the leaflet she received from her friend was the same flyer that Lukavitch had circulated earlier. Lee said that she gave the leaflet with a note to one of the “gentlemen” arriving before the election in the morning<sup>12</sup> (P Exh. 3; Tr. 74-76).

5 Lee testified that she was approximately 25 feet away from Sheikh when he was handing out the “paper.” Lee could not identify the paper that Sheikh was distributing nor was she able to hear any conversations he was having with other employees on the morning of the election. Lee recalled that Sheikh was talking to two other peace officers while they were on their post of duty. Lee testified that there were lieutenants and sergeants on the casino floor  
10 when Sheikh was allegedly distributing YRPBA election literature, intimating that the supervisors had condoned Sheikh’s action.

Lee admitted that she did not actually receive the flyer from Lukavitch or Sheikh, but that another peace officer gave her the flyer that Lukavitch was purportedly distributing and a friend  
15 gave her the flyer purportedly given by Sheikh (Tr. 79-82).

Kenneth Wynder (Wynder) also testified on behalf of LEEBA. Wynder was LEEBA’s union president for the past seven years. He testified that he had monitored the election held on August 24. Wynder testified that after the Board decided in June to include sergeants and  
20 lieutenants in the appropriate unit for bargaining and to hold an election, LEEBA began its election campaign. Consistent with Lee’s testimony, Wynder insisted LEEBA never campaigned on the Respondent’s property because his members were concerned over the April 4 email from Bittinger. Wynder said that the email was discussed in a union meeting shortly after April 4<sup>13</sup> and his members were “scared” and “upset” about possible unspecified threats of  
25 reprisal from the Respondent (Tr. 92-95, 109).

Wynder testified that on the day of the election, he arrived in the morning for a pre-election meeting with the NLRB’s examiners. He believed that there were two pre-election sessions, one at 6:30 in the morning and an evening session. He had no problem in accessing  
30 the voting area that morning. He testified that he showed his ID, was given a sticker tag with his name and he went upstairs to the casino’s ballroom where the voting would be conducted. Wynder complained that he was unable to attend the evening election session.<sup>14</sup> He said that Bittinger questioned why he needed to be upstairs in the evening and questioned the accuracy of Wynder’s first name on his ID. Wynder testified that his ID was changed from “Kenny” to  
35 “Kenneth” and then Bittinger allowed him to go upstairs. Wynder maintains that by the time this was straightened out, the pre-election meeting was over, so instead, he left the premises and never went upstairs to the voting area (Tr. 98-103). Wynder admitted that another union organizer, Peter Luck (Luck), who had accompanied him that evening, was allowed to go  
40 upstairs to the voting area without any problems. When asked, Wynder testified that Luck was a union organizer for LEEBA (Tr. 105, 106). Wynder also admitted that the mailing list and roster of the employees that LEEBA used in mailing out campaign literature for the election were provided by the Respondent also without any problems (Tr. 107, 108).

45 <sup>12</sup> Presumptively, they were the Board agents monitoring the election.

<sup>13</sup> The Respondent objected as hearsay when Wynder testified to what his members may have said about the email. The objection was sustained and no further testimony was taken on this point.

50 <sup>14</sup> The Respondent objected to Wynder’s testimony that he was not permitted access during the evening session on the basis that this allegation was outside the scope of the Petitioner’s objection to the election. I overruled the objection consistent with the rationale for this line of questioning proffered by the counsel for the Petitioner (Tr. 100).

Finally, Sheikh testified as a subpoenaed witness for LEEBA. Sheikh has been employed as a peace officer with the Respondent for over 5 years. He was previously in the Local 153 bargaining unit, but after the election, he said he no longer belongs to a union (Tr. 113-115). Sheikh testified that he was a union observer for YRPBA during the election and was involved in the election campaign, but insisted that he campaigned only after his work shift (Tr. 116).

Sheikh denied that he had distributed flyers in the casino and only asked the officers who were his friend to vote. Sheikh maintained that he spoke to these coworkers in the parking area while they were waiting for the parking shuttle bus to take them to work (Tr. 116-120). Sheikh adamantly denied distributing any leaflets on the casino floor and denied seeing the leaflet referenced by Lee in P Exh. 2 (Tr. 120, 121).

### III. Discussion and Analysis

#### a. The Section 8(a)(1) violation

The Acting General Counsel argues that the rule promulgated by Bittinger on April 4 violated Section 8(a)(1) of the Act when he instructed his supervisors to advise their employees that they are not permitted to advertise another union or bash their current union while on the Respondent's property, including the posting of union flyers on company property. The Acting General Counsel contends that an employer violates Section 8(a)(1) of the Act when it maintains a work rule that could reasonably tend to chill employees in the exercise of their Section 7 rights.<sup>15</sup> I agree.

Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." Section 7 "organizational rights are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees to solicit on behalf of a union, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), and to solicit and communicate with other employees regarding terms and conditions of employment. *Beth Israel Hosp. v. NLRB*, 437 U.S. at 491.

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The Board's analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act was set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)

In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity

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<sup>15</sup> GC Br.

protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

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*1. The no union bashing rule  
violated Section 8(a)(1)*

The Respondent argues that the email was an isolated incident, the rule was not widely circulated, and it was never enforced by Bittinger or the supervisors.<sup>16</sup> I disagree.

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The rule was disseminated to supervisors who were under Bittinger's control and instructed them to "...advise all union members that they are not permitted to advertise another union or bash their current union while on property this includes posting flyers on company property." Applying the principles noted above to the Respondent's rule, I find that the prohibition explicitly restrict activities protected by Section 7 of the Act. The discussion promoting one's union and criticizing another union is protected by the Act. The discussion among union members as to how they may benefit in their terms and conditions of employment under one union over another is also protected under the Act. By prohibiting their discussion, the Respondent explicitly restricted their Section 7 rights.

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The Acting General Counsel argues that when the alleged unlawful rule explicitly restricts Section 7 activity, it does matter that the rule was never actually enforced. I agree. In *Lafayette Park*, the Board stated: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." Consequently, the employer's "mere maintenance" of a work rule violates Section 8(a)(1) of the Act if the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage*, supra (also quoting *Lafayette Park Hotel*); *Target Corporation*, 359 NLRB No. 103, JD slip op. at 23 (2013).

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I find that the rule is also unlawful because it was initiated in response to a protected activity, that is, the posting of the initial flyer criticizing Local 153. *Lutheran Heritage Village-Livonia*. Bittinger testified that the rule was promulgated because of some alleged criminal activity (Tr. 46, 47). However, I do not credit his testimony on this point. Bittinger admitted that his no union bashing rule was implemented because the first posted flyer had criticized Local 153. Bittinger further admitted that the initial flyer he took down was in fact bashing Local 153 and was the reason for his April 4 rule. Further, the email subject matter was captioned "Union" and Bittinger testified that he had never needed to issue such a rule before the posting of the flyer criticizing Local 153. The contents of the email did not mention any criminal activities. A reasonable reading of Bittinger's testimony and the email shows that the intended reason for his rule was designed to limit discourse and solicitation among union members of their Section 7 protected activity.

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*2. The rule was widely circulated*

The rule prohibiting union bashing, solicitation and dissemination of union literature was widely circulated and not isolated. The rule embodied in Bittinger's April 4 email went out to

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<sup>16</sup> R Br.

fourteen employees. Seven of the employees were sergeants and lieutenants (Tr. 27). The parties had stipulated that the seven lieutenants and sergeants employed by the Respondent and copied in his email were employees within the meaning of Section 2(3) of the Act. As such, seven of the fourteen employees were non-supervisors. The email also instructed the managerial employees under Bitteringer's control to inform union members of the rule. As a consequence, it is reasonable to infer that the rule prohibiting union bashing and advertising was carried out by the supervisors pursuant to Bitteringer's instructions and dissimilated among the union member employed by the Respondent.<sup>17</sup> Lee testified that she observed a copy of the rule in an email generated by Corasi that was posted on the company's bulletin board (P Exh. 1). I would credit Lee's testimony on this point. Although Corasi was not called as a witness, the document speaks for itself and it is clear to me that Corasi had printed Bitteringer's email containing the rule. Lee could not have obtained a copy of the email unless it was given to her or, as she testified, it was posted on the Respondent's bulletin board, at least through mid-April. As such, the rule was visible for all who passed the bulletin during the early to mid-April timeframe.

### 3. *The no union bashing rule was overly broad*

The Respondent's rule prohibiting the advertisement and criticism of unions by union members on company property also violates Section 8(a)(1) of the Act for being overly board.

The Board and the courts have long recognized that, with respect to employee solicitation, an employer has a legitimate interest in maintaining discipline and production in operating its business. *Republic Aviation Corp.*, supra at fn.8. Therefore, an employer work rule prohibiting employee solicitation "on working time and in working areas is presumptively valid." *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987). Conversely, an employer work rule prohibiting employee solicitation during nonwork time and in nonwork areas is presumptively invalid "absent a showing by the employer that a ban is necessary to maintain plant discipline or production." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978). *Accord Restaurant Corp. of America*, 827 F.2d at 806; *Our Way, Inc.*, 268 NLRB 394, 394-95 (1983).

Bitteringer's rule does not distinguish between working and off-duty employees and does not define what is considered "company property." Employees have the right to solicit on company property during their nonworking time, absent special circumstances. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Republic Aviation*, supra. Gambling casinos, such as the one that the Respondent operates, could lawfully prohibit employees from soliciting each other and disseminating union literature while working in the casino's gambling areas. A gambling casino, however, could not lawfully maintain a general ban on that activity beyond that area and during nonwork time of the employees. The Board has held that a casino violated Section 8(a)(1) by maintaining a rule that prohibited off-duty employees from soliciting or distributing in public areas of its facility other than the gaming areas. *Santa Fe Hotel & Casino*, 331 NLRB 723

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<sup>17</sup> The Respondent argues that counsel for the Acting General Counsel failed to proffer any evidence that Bitteringer's rule was widely circulated among union members. The Respondent contends that Lee was not credible when she observed the email on the company bulletin board because it came from Corasi and not Bitteringer (P Exh. 1). On this point, I credit Lee's testimony that the email was posted on the company bulletin board. The fact that the Acting General Counsel has raised a legally sufficient inference that the email was widely circulated either by Bitteringer's instructions to his supervisors to inform the employees of the rule or by the posting of the rule on the company bulletin board, the Respondent would be required to rebut this inference, which it failed to do.

(2000); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). Here, a reading of the Respondent's no union bashing and no-distribution rule shows that it is unlawfully broad because it prohibits off-duty employees from soliciting support of one union over another and prohibits the distribution of union literature not only in the working areas of the casino property, but also at any time and in all areas of the casino, including parking areas, sidewalks and public restrooms where off-duty employees cannot exercise their Section 7 rights under any circumstances. *Crowne Plaza Hotel*, 352 NLRB 382 (2008).

There is no doubt that these restrictions would substantially hinder employees in the exercise of their Section 7 rights. In complying with these restrictions, employees would not be permitted to discuss with others, including their fellow employees or union representatives, the benefits of one union over another, the solicitation to promote a particular union, discussion on wages and other benefits that they may receive from one union over another, and the right to criticize a particular union. This prohibition greatly curtails their Section 7 protected concerted activities. *Quicken Loans, Inc.*, 359 NLRB No. 141, JD slip op. at 5 (2013). The "no union bashing and no union solicitation" rule contained in Bitteringer's email therefore violates Section 8(a)(1) of the Act. Accordingly, I find and conclude that employees would reasonably construe the language in the rule to prohibit Section 7 activity because the rule bars employees from speaking and promoting to their coworkers about the benefits and disadvantages of each union in regard to their wages, terms and conditions of employment.<sup>18</sup>

*b. The representation case*

As a general rule, the period during which the Board would consider conduct as objectionable, often called the "critical period" is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg, Co.*, 134 NLRB 1275 (1961). The critical period here is the date that LEEBA filed its petition with the Region on June 12 to the date of the election on August 24.

It is the objecting party's burden to show that the misconduct occurred during this critical period. *Dollar Rent-A-Car*, 314 NLRB 1089 (1994). Petitioner LEEBA argues that the Respondent's no union bashing rule was not uniformly applied. Petitioner alleges that the Respondent allowed YRPBA to campaign and distribute union literature prior to the election. Specifically, the Petitioner raised several allegations of misconduct at the hearing seeking to set aside the election. The Petitioner alleges that (1) supervisors, allegedly in support for YRPBA and condoned by the Respondent, were allow to coerce employees in signing union authorization petitions for YRPBA; (2) YRPBA held captive audience meetings with employees within 24 hours of the election and engaged in disseminating campaign literature on Employer premises within 24 hours of the election; (3) the no union bashing rule issued by Bitteringer had interfered with the employees' freedom in voting; and (4) the Respondent interfered with the election when Wynder was not permitted access to the voting area.

Intervenor YRPBA argues that there was no objectionable conduct that adversely affected the election even if there was a technical unfair labor practice violation in the promulgation of an overly broad no solicitation rule. Intervenor also maintains that the objections raised at the hearing by the Petitioner were outside the scope of the objection investigated by the Regional Director.<sup>19</sup>

<sup>18</sup> The Respondent argues several affirmative defenses which I find without any merit or simply not appropriate answers to the complaint.

<sup>19</sup> The Petitioner withdrew all but one objection (G Exh. 1(e)).

In the notice of hearing on the objection (GC Exh. 1(m)), the Regional Director cited evidence from the investigation for the sole objection to be heard

5        Objection 2: Intervenor held captive audience meetings with employees within 24 hours of the election and engaged in disseminating campaign literature on Employer premises within 24 hours of the election.

10        The Regional Director contends that the Respondent failed

to uniformly enforce its no-solicitation policy regarding distribution of union campaign material on the Employer's premises, both prior to and within the 24 hour period immediately preceding the election.

15        As noted, the Respondent has a no-solicitation and no-distribution policy in effect since March 2007 (R. Exh. 1). The Regional Director specifically referenced in her findings that the Respondent had not uniformly applied this policy with its employees. As an initial matter, the parties are not litigating the lawfulness of the Respondent's no solicitation/distribution policy. The sole objection is the alleged lack of uniformity in the enforcement of the Respondent's

20        policy when the Intervenor was allegedly permitted to disseminate campaign union literature.

Although alleged by the Petitioner at the hearing, the Regional Director did not find that the no union bashing rule initiated by Bittinger was part of objection 2. Nor did the Petitioner raise the misconduct noted above with the Region as subsequently argued by the Petitioner at the hearing. Nevertheless, I find it necessary to consider the no union bashing rule along with the misconduct raised at the hearing because of the closeness of the election. In my opinion, all reasonably alleged misconduct, even those not raised by the Petitioner with the Region, must be closely scrutinized when the narrowness of the election results is close as herein, by a difference of four votes. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995).

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*c. The legal standard in the  
representation election case*

35        I begin with the general proposition set forth in *General Shoe Corp.*, 77 NLRB 124, 127 (1948), a case involving a consolidated complaint and representation proceeding

40        In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions: it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.<sup>20</sup>

45        The Board has announced that evidence of an unfair labor practice, along with the closeness of the election results as well as other factors would determine whether they are sufficiently extensive to set aside an election. The Board applies an objective test as to whether the conduct has a tendency to interfere with the employees' free choice.

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<sup>20</sup> *General Shoes, Corp.*, supra also holds the parties to a more demanding standard of conduct for setting aside an election even if the conduct is not so egregious as to violate Section (a)(1).

In *Taylor Wharton Division* 336 NLRB 157, 158, the Board would consider the following factors in determining whether the misconduct interfered with employees' freedom of choice (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

*1. The objection that Intervenor solicited  
petition signatures*

With regard to the alleged improper solicitation by YRPBA during the union authorization petition in June, prepetition conduct may be considered where it "adds meaning and dimension to related postpetition conduct." *Dresser Industries*, 242 NLRB 74 (1979).

I find that this event was not objectionable since it had no effect on the election. The distribution of the authorization petition occurred soon after June, when YRPBA intervened to represent the Respondent's peace officers. The Decision and Direction of Election by the Regional Director was issued on July 24, approximately one month after YRPBA intervened to participate in the election. Lee testified that during this one month period, she observed union literature "were all over central dispatch." She did not specifically testify that they were YRPBA literature. When inquired further, Lee admitted that the literature was only the union authorization petition for YRPBA and that the petition was not posted on the company bulletin board. Lee also said that sergeant Wilmanicki asked her to sign the petition, but she refused and stated to him that she supports LEEBA. I cannot find any credible evidence that YRPBA's solicitation of signatures during this period had adversely affected the election held in August. In addition, there is nothing in the record to show that the Respondent had somehow condoned YRPBA's alleged misconduct. When pressed, Lee admitted that the petitions were not posted on the company bulletin board. Lee complained that other LEEBA supporters were subjected to unspecified threats of reprisal by the Respondent for not supporting YRPBA. I do not credit her testimony on this point.

The Petitioner proffered no credible evidence that the Respondent permitted YRPBA to distribute union literature on its premises because it somehow favored one union over another. Lee testified that she told sergeant Wilmanicki to his face of her unwavering support of LEEBA when he asked for her signature. This does not demonstrate to me of an employee fearful of retaliation. The record further shows that Lee was never subjected to any discipline for her support of LEEBA. The Respondent also provided information that none of the other officers mentioned by Lee who were disciplined was related to their support of LEEBA (R. Br. at 11-13). Accordingly, I recommend that this objection be overruled and dismissed.

*2. The objection that the Intervenor held captive audience meetings with employees  
within 24 hours of the election and engaged in disseminating campaign  
literature on Employer premises within 24 hours of the election*

With regard to the disparate application of the Respondent's no solicitation/distribution policy, I find no credible evidence to support this objection. The distribution of union literature 24 hours prior to an election is not, standing alone, sufficient grounds for setting aside an

election...” *Peerless Plywood Co.*, 107 NLRB 427 (1953). The Petitioner argues, however, that the Respondent did not uniformly apply its policy when it permitted YRPBA to disseminate union literature on the employer’s premises.

5 The only anecdotal evidence provided on this objection was through Lee’s testimony. My close review of her testimony shows that Lee never actually observed Lukavitch or Sheikh distributing campaign literature on the Respondent’s premises within 24 hours of the election. This same review also shows that Lee never actually heard any conversations that Sheikh may have had with his coworkers.

10 Lee testified that she observed Lukavitch distribute leaflets the night before the election. Lee then admitted that she did not see what sergeant Lukavitch was actually distributing. She received a flyer that Lukavitch was allegedly handing out from another officer at a later time during her lunch. Lee testified that she also saw Sheikh passing “paper” on the night of the election. She saw Sheikh give out “paper” on the casino floor near mid-night on August 23. Lee said that she received one of the leaflets that Sheikh was distributing from a friend, also given to her during her lunch break. However, Lee admitted that she never saw the literature that Sheikh was distributing because she was 25 feet away from Sheikh. Lee also admitted that she never heard the conversations that Sheikh was having with his two coworkers. Therefore, I cannot  
20 conclude that the YRPBA campaign flyers that Lee received from a coworker and a friend were actually the same documents that Lukavitch and Sheikh were alleged to have disseminated during the night before the election.

25 The Petitioner also objected that the Intervenor held captive audience meetings with employees within 24 hours of the election. In *Peerless Plywood Co.*, supra, the Board held that employers and unions are prohibited “...from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting election.” However, no evidence has been proffered that the Intervenor or the Respondent held any captive audience meetings with employees within 24 hours of the election as contended in  
30 objection 2. Indeed, there is no evidence that the Intervenor made any speeches, comments, or remarks to any voter-eligible employees within 24 hours of the election. At most, it is alleged that officer Sheikh conversed with two unit employees while they were on their duty post, which is far from concluding that they were a captive audience. This cannot be characterized as speech to a captive audience under the *Peerless Plywood* standard.

35 Further, although Lee testified that sergeants and lieutenants were on the casino floor, implying that they condoned Sheikh’s distributing union literature, I find that there is absolutely no credible evidence that Sheikh was in fact giving out union literature which would have required the supervisors to intervene because of the no solicitation policy.

40 Finally, I credit Sheikh’s testimony that he never (prior to the hearing date) saw a copy of the flyer that he purportedly distributed on the casino floor. I find that Sheikh credibly testified that he did not give out union literature during the night before or morning of the election and that the only time he discussed union matters were with his coworker friends at the  
45 Respondent’s parking area as they waited for the shuttle bus to transport them to work.<sup>21</sup>

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50 <sup>21</sup> Sheikh was subpoenaed as a witness by the Petitioner. Although the Petitioner questioned Sheikh’s credibility as a witness, the Petitioner did not move to declare him as a hostile witness. I find that Sheikh was not evasive or a hostile witness. Sheikh’s command of the English language was limited and he testified in a haltingly manner. This is far from concluding that Sheikh was not a credible witness.

Accordingly, I find and recommend that this objection be overruled and dismissed.

*3. The objection with the  
no union bashing rule*

With regard to the no union bashing/solicitation rule issued by Bittinger in his email of April 4, such conduct that constitutes an unfair labor practice violation may be the basis for invalidating an election. In *Playskool Mfg., Co.*, 140 NLRB 1417 (1963), the Board held that

Conduct of this nature which is violative of Section 8(a)(1) is a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.

However, that is not to say that all unfair labor practice conduct will warrant setting aside an election. *Caron International*, 246 NLRB 1120 (1979). As the Board noted in *Airstream Inc.*, 304 NLRB 151, 152 (1991)

A violation of Section 8(a)(1) found to have occurred during the critical period is a fortiori, conduct which interferes with the results of the election unless it is so de minimis that it is “virtually impossible to conclude that [the violation] could have affected the results of the election.”

In *Delta Brands, Inc.*, 344 NLRB 253 (2006) and *Safeway, Inc.*, 338 NLRB 525 (2002), the Board held that the mere maintenance of an invalid rule was not sufficient to overturn the election results. I find that Bittinger’s rule did not interfere with the election.

As an initial matter, there is an absence of any credible evidence to show that this presumptively unlawful rule was applied in a disparate manner by the Respondent to the two competing Unions. In the instant case, there is no evidence to indicate the Respondent’s preferential treatment in the promulgation and maintenance of the rule between the Petitioner and the Intervenor. In *Flat River Glass Co.*, 234 NLRB 1307 (1978), the Board overruled six objections filed by the losing union to set aside a representation election because there was no evidence that the unlawful no-solicitation rule was applied in a disparate manner. Also, *Randall Rents*, 327 NLRB 157 (1999); *Showell-Poultry Co.*, 105 NLRB 580 (1953).<sup>22</sup>

The critical period in this proceeding commenced with the June 12 filing of a representation petition by LEEBA to the August 24 election. *Peerless Plywood*, supra. The no union bashing rule was issued by Bittinger more than two months earlier. While I believe that his rule was circulated to more than seven bargaining unit employees as explained above, it is not clear how many of the 130 eligible voters were informed of this rule. More significantly, there is also no credible evidence that Bittinger had enforced the rule or reaffirmed his instructions to his supervisors about the rule at any time between April 4 and August 24.

Wynder testified that the LEEBA campaign for the election was conducted off the employer’s premise due to his bargaining unit members receiving the April 4 email and were “scared” and “upset” over Bittinger’s rule for fear of unspecified threats of reprisal. Lee testified

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<sup>22</sup> I have considered and dismissed the possibility that the Respondent had a hidden agenda to promulgate an unlawful rule to favor the Intervenor since the rule was promulgated, in part, because Bittinger was upset over the criticisms of Local 153 in the flyers. However, the Region determined that YRPBA was not affiliated with Local 153 and more significantly, no credible evidence has been proffered to show a disparate enforcement of the rule to the detriment of the Petitioner.

she never campaigned on the employer's premises for fear of unspecified retaliation. Except for their naked assertions of potential reprisal, no credible evidence has been proffered from any other witnesses to corroborate this allegation.

5 I find that LEEBA's decision to conduct its election campaign off premises was solely its own decision and not affected by any potential reprisal from the Respondent.

10 The record is devoid of any threats, comments, statements or even an impression of reprisal made against LEEBA supported members from either the Intervenor or the Respondent. Indeed, Lee testified that she was fearful of reprisal but yet told a supervisor to his face that she supported LEEBA and refused to sign the petition. There is nothing in the record to suggest that Lee was subsequently disciplined or subjected to reprisal for her union stance on behalf of LEEBA. Additionally, as described above, I do not credit Lee's testimony that LEEBA organizers had solicit or disseminated union literature or campaign paraphernalia within 24  
15 hours of the election.

20 Without any credible evidence to the contrary, the diminishing effect of Bittinger's rule through the passage of time was unlikely to have any significant impact on the outcome of the election. Accordingly, I find and conclude that the rule, although an explicit violation of Section 8(a)(1), was so de minimis by the time of the election held more than 4 months later that it is virtually impossible to conclude that the violation affected the results of the election.<sup>23</sup> *Airstream, Inc.*, supra. I recommend that this objection be overruled and dismissed.

25 *4. The objection that respondent denied  
Wynder's access to the voting area*

I find without merit the allegation that the Respondent's refusal to allow Wynder to access the voting area had interfered with the election.

30 Wynder testified that he had no problem accessing the voting area in the morning of the election for the purpose of having a pre-election meeting with the Board agents, union officials and the Respondent's representatives. Wynder testified that there was another pre-election session for the evening vote which he was not permitted to attend. Wynder stated that he wanted to make sure that everything was placed right in the voting area before the  
35 commencement of the election. There is a dispute whether there were two pre-election sessions or only one held in the morning. Nevertheless, when Wynder approached the voting area in the evening, he was not permitted upstairs where the voting was to occur because his ID tag did not match his name. Once his ID tag was revised and reflected his correct name, Wynder was allowed to proceed upstairs by Bittinger. At this point, Wynder decided to leave the  
40 area because he believed that the pre-election session was over.

45 I find that the Respondent did not prevent Wynder from entering the voting area; he simply decided not to do so after his name on the ID card was revised. It is significant to note that Wynder was not an observer for LEEBA. He was accompanied by a LEEBA organizer, Peter Luck, who was permitted to go upstairs without any delay. It is also noteworthy that Objection 6, "Employer committed an unfair labor practice by interfering with the election

50 <sup>23</sup> The removal of the three pieces of union literature by Bittinger in early April was never raised as an objection by the Petitioner. To the extent that it was considered as such, I find that the removal of the leaflets by Bittinger in early April was an isolated incident and did not affect the outcome of the election. *US Aviax Co.*, 279 NLRB 826 (1986).

process” presented in the Petitioner’s ‘Objections to the Conduct of the Election and Conduct Affecting the Result of Election’ was in fact withdrawn by the Petitioner (GC Exh. 1(e)). Accordingly, I find and recommend that this objection be overruled and dismissed. I further recommend that the representation election held on August 24, 2012 be certified.

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### Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and implementing the following no-solicitation and no-distribution rule on April 4, 2012, the Respondent has committed an unfair labor practice in violation of Section 8(a)(1) of the Act

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Please advise all Union members that they are not permitted to advertise another union or bash their current union while on property this includes posting flyers on company property.

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4. The Respondent has not violated the Act except as expressly indicated in this decision.

### Remedy

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Having found that the Respondent has violated Section 8(a)(1) of the Act by promulgating and maintaining an unlawful no solicitation/distribution rule, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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Inasmuch as I have found the Respondent has promulgated and implemented an unlawful rule, I shall recommend that it be ordered to rescind this rule and notified the Union and employees that it has done so.

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On these findings of fact and conclusion of law and on the entire record, I issue the following recommend<sup>24</sup>

### Order

The Respondent, Yonkers Raceway d//b/a Empire City Casino at Yonkers Raceway, its officers, agents, successor, and assigns, shall

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1. Cease and Desist from

(a) Maintaining and enforcing the following rule: Please advise all Union members that they are not permitted to advertise another union or bash their current union while on property this includes posting flyers on company property.

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<sup>24</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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(b) Maintaining a no-solicitation and no-distribution rule that prohibits employees from soliciting other employees during nonwork time to support or criticize the Union or any other labor organization and from distributing union literature or campaign paraphernalia during nonwork time in nonwork areas.

(c) In any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unlawful rule, and notify its employees and the Union that the policy has been rescinded.

(b) Within Fourteen (14) days, post at the Respondent's Yonkers, New York facilities, a copy of the attached notice marked "Appendix."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 4, 2012.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the representation election held on August 24, 2012 be certified.

IT IS FURTHER ORDERED that the Petitioner's objection and allegations of misconduct is overruled and dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C., July 8, 2013.

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Kenneth W. Chu  
Administrative Law Judge

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<sup>25</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

**POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** promulgate and maintain a rule that prohibits employees from advising, promoting or criticizing the Union or any other labor organization during nonwork time in nonwork areas.

**WE WILL NOT** promulgate and maintain a no-solicitation and no-distribution rule that prohibits employees from soliciting other employees during nonwork time to support or criticize the Union or any other labor organization and from distributing union literature or campaign paraphernalia during nonwork time in nonwork areas.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

YONKERS RACEWAY D/B/A EMPIRE CITY  
CASINO AT YONKERS RACEWAY

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

26 Federal Plaza, 3614 Floor,  
New York, New York 10278-0104  
Hours of Operation: 8:45 a.m. to 5:15 p.m.  
212-264-0300.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346